

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

-----: :  
JANE DOE, :  
Plaintiff, :  
-vs- : Case No. 1:18-cv-614  
FAIRFAX COUNTY SCHOOL BOARD, :  
Defendant. :  
-----: :

V O L U M E 10

JURY TRIAL PROCEEDINGS

August 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

APPEARANCES:

John R. Ates, Linda M. Correia, and Lauren A. Khouri,  
Counsel for the Plaintiff

Sona Rewari, Stuart A. Raphael, and Andrea R. Calem,  
Counsel for the Defendant

1           NOTE: The August 9, 2019 portion of the case begins  
2 in the absence of the jury as follows:

3 JURY OUT

4           THE COURT: All right. Good morning to everyone.

5           MR. ATES: Good morning, Your Honor.

6           MR. RAPHAEL: Good morning, Your Honor.

7           THE COURT: I very much appreciate the briefing that  
8 you did on the additional question by the jury, and I know that  
9 you were working, burning both ends of the candle.

10           So I looked at the briefs. I've proposed an answer  
11 to the question. And I will hear comments at this time from  
12 counsel.

13           Mr. Ates.

14           MR. ATES: Your Honor, we appreciate as well you and  
15 your clerks burning the candle on three different ends probably  
16 given your docket today.

17           We would agree with the language the Court has  
18 proposed, we think it helps clarify for the jury this issue.

19           I do want to raise whether -- from a lay person's  
20 perspective, their language is quiet elegant on looking at what  
21 does "actual knowledge" mean.

22           And I don't know, given where the Court appears to be  
23 in your draft language, whether we need to be a little bit more  
24 explicit to the jury that the concept of actual knowledge is as  
25 explained in their concept A. To let them know that it is a

1 compilation of information known to responsible school  
2 officials.

3           They have asked that specific question. I think they  
4 are wanting an answer on it. And we would propose a little bit  
5 more guidance in that regard to say that.

6           I understand the Court's concerns about  
7 overinstructing, but in this instance the jury has asked a  
8 specific question, is it A or is it B, and the law says it is  
9 A. And I don't think it would cause a problem of error if the  
10 Court instructs them on that.

11           I hope that answers Your Honor's question.

12           THE COURT: Yes.

13           MR. ATES: The one thing I do want to point out is  
14 yesterday the School Board was complaining about instruction  
15 number 5 and the word "alleged" in there. They in docket 244  
16 at page 48 of 68, which is page ID number 4389, defendant  
17 proposed that instruction, Your Honor.

18           And it would not -- the only changes this Court made  
19 was to add the words "of Jane Doe's sex" after "reasonable  
20 person" in prong number two.

21           They cannot be heard to complain of a jury  
22 instruction they proposed, both under the invited error  
23 doctrine and the subset of that doctrine, which is, if you  
24 propose a jury instruction and the Court gives it, you cannot  
25 be heard to complain.

1           So I just wanted to make sure that was clear for the  
2 record, Your Honor.

3           THE COURT: Okay. Thank you, Mr. Ates.

4           Mr. Raphael.

5           MR. RAPHAEL: Good morning, Your Honor.

6           Let me begin with -- we do object to the proposal.  
7 But I think there is a typo in the end of it. I think you mean  
8 question 3, not question 4.

9           THE COURT: No, I mean question --

10          MR. RAPHAEL: Because question 3 is the one that goes  
11 to "actual knowledge."

12          THE COURT: Yeah, but they also are looking at  
13 question 4 as: Question 4 posits that "sexual harassment" is  
14 known, even though question 3 asks re actual knowledge of the  
15 "alleged sexual harassment."

16          So I had proposed putting the second  
17 sentence/paragraph in there: If the School Board had actual  
18 knowledge of such an allegation, then it knew of the sexual  
19 harassment of Jane Doe on the March 8, 2017 bus trip for  
20 purposes of question number 4.

21          MR. RAPHAEL: Okay. We think the problem with this  
22 response is it does not capture the requirement that the  
23 knowledge of the appropriate school officials include both the  
24 facts showing that there was harassment and that it was so  
25 severe, pervasive, and reasonably offensive -- or objectively

1 offensive to as to deny educational opportunities.

2           Davis shows that those are both required. The Hill  
3 case from the Eleventh Circuit that we cited in our brief  
4 explicitly says that, both are required. And they are both  
5 required because under Title IX, which is a spending clause  
6 statute, a school does not -- a funding recipient doesn't have  
7 a legal obligation to respond until both of those things are  
8 shown.

9           And that originates with the Gebser requirement, that  
10 you have a responsibility to respond to discrimination that  
11 violates Title IX. So we --

12           THE COURT: Why isn't that laid out in 1 and 2 that  
13 they have?

14           MR. RAPHAEL: Because the way -- the way this  
15 response reads, it suggests that only 1 counts. And it doesn't  
16 capture the idea that 2 is important also.

17           And that's why we thought our response, and I  
18 appreciate Mr. Ates', you know, recognition that it is a pretty  
19 elegant and concise answer, I think captures it both.

20           And it captures the idea -- I mean, our suggested  
21 response is, "Question 3 asks you to determine if the School  
22 Board had actual knowledge of the conduct by Jack Smith on  
23 which you based your answers to questions 1 and 2."

24           Respectfully, that is a much more direct answer to  
25 the jury's question, and I think obviates the need to get into

1 anything else. So we think that is the better answer.

2 We think that the language "compilation," which I  
3 acknowledge was in the jury's question, I think that Mr. Ates'  
4 suggestion about talking about compilations of information is  
5 confusing to them and less direct and concise than what we  
6 propose.

7 I also wanted to answer a couple things. We did  
8 raise before the charge the problem with the use of the word  
9 "alleged." So I don't think we're estopped or precluded from  
10 pointing that out as the case went along before the Court  
11 decided on what the proper charge would be.

12 And this verdict form is the one that the plaintiffs  
13 proposed, not the one that we proposed, which did not include  
14 the word "alleged."

15 I also wanted to respond to Mr. Ates' suggestion in  
16 his brief this morning that the facts about actual knowledge  
17 are really not in dispute. They are.

18 And just so it's clear, Victoria Staub and Michelle  
19 Taylor had very different testimony about what Victoria told  
20 Michelle Taylor that Friday. Victoria said she talked about  
21 the digital penetration. Michelle Taylor said that never  
22 happened.

23 And the facts are also disputed about what happened  
24 on Monday when Ms. Hogan was interviewing Ms. Doe. The facts  
25 as recounted by Ms. Hogan told her that there was no objective

1 evidence of a sexual assault. That even though -- even  
2 crediting Ms. Doe's claim that she didn't want to do it, there  
3 was no objective manifestation of that based on her  
4 testimony -- based on what she told Ms. Hogan and what Mr.  
5 Smith told Ms. Hogan.

6 So I just want -- I just want to make clear that we  
7 think that the facts are hotly disputed about whether there was  
8 actual knowledge of the facts that would give rise to a Title  
9 IX violation.

10 And so, I would return then to suggesting that our  
11 proposed elegant, and short, concise answer really solves the  
12 problem. And we would urge the Court to give that.

13 THE COURT: All right, thank you.

14 MR. ATES: May I briefly, Your Honor?

15 THE COURT: Yes.

16 MR. ATES: If I misspoke, I apologize, but I thought  
17 what I called elegant was the jury's own language by lay people  
18 regarding those --

19 THE COURT: That's the way I understood it.

20 MR. ATES: Thank you, Your Honor. As far as their  
21 proposed instruction, it did have the word "actual knowledge"  
22 in it. They copied O'Malley but for "of the person's sex" in  
23 there.

24 So the only other issue, Your Honor, and I am not  
25 sure Your Honor needs to touch it, is they did have the

1 question about the vacation. I don't know if Your Honor needs  
2 to say, please deliberate fully today and if we need -- you  
3 know, but maybe we just let that lie. But I at least wanted to  
4 raise it with Your Honor to get Your Honor's thinking on that.

5 THE COURT: Yeah. I mean, I have the question in  
6 front of me and I was going to inquire. I think I'll wait  
7 until later in the day to talk about that and see how they do.  
8 And I can acknowledge that I have received that question and  
9 will address it later in the day.

10 MR. ATES: Thank you, Your Honor.

11 THE COURT: Okay. I mean, I don't want tell them  
12 that you have to finish by 2 o'clock or there are consequences,  
13 we don't do that.

14 MR. ATES: That's why I was in my own head, Your  
15 Honor, pondering do we say something or not. But I think if  
16 Your Honor says we can address that as needed later in the day,  
17 I think we would agree with that.

18 THE COURT: Okay. All right. We're going to take a  
19 recess. We may tweak the language in the instruction. We will  
20 bring you out copies of what we decide on before we bring the  
21 jury in. And then we will hopefully have our jury here shortly  
22 and I will ask them about, of course, the normal questions  
23 about whether they have done any research or investigation, and  
24 then I will just read the answer to their questions to them  
25 here, and we will send the written statement back to them.

1 MR. ATES: Thank you. Your Honor, I may not have  
2 stated on the record, we object to referring them back to 1 and  
3 2. They are going through each piece, and we think they are  
4 going through it seriatim, and that's appropriate.

5 Thank you.

6 THE COURT: All right. Mr. Raphael.

7 MR. RAPHAEL: Yeah, I want to -- it was wrong of me  
8 to assume that the compliment was intended for me, and I  
9 apologize for that.

10 THE COURT: Okay. All right, we're in recess.

11 NOTE: At this point a recess is taken; at the  
12 conclusion of which the case continues in the absence of the  
13 jury as follows:

14 JURY OUT

15 THE COURT: All right. Ready for our jury?

16 MR. ATES: We are, Your Honor. Thank you.

17 MR. RAPHAEL: Yes, Your Honor.

18 MS. REWARI: Yes, Your Honor.

19 THE COURT: All right, Joe, let's get our jury,  
20 please.

21 NOTE: At this point, 9:11 a.m., the jury returns to  
22 the courtroom; whereupon the case continues as follows:

23 JURY IN

24 THE COURT: All right, please be seated.

25 Good morning, ladies and gentlemen, thank you for

1 once again working your way in here on time.

2 Let me ask you my very important question, that you  
3 didn't do any research, or investigation, or talk to anybody  
4 about the case. Can I have a nod of heads from everybody?

5 Thank you so much. As you know, it is critical.

6 You had asked right before you left last night a  
7 question which reads: Can question 3 be answered affirmatively  
8 without implying that sexual harassment was "known" by the  
9 School Board. Question 4 posits that "sexual harassment" is  
10 known, even though question 3 asks re actual knowledge of  
11 illegal sexual harassment -- of "alleged sexual harassment."

12 And second: We continue to have questions re actual  
13 knowledge. Is actual knowledge, A, a compilation of  
14 information about an event or... B, the conclusion decided  
15 based on information provided.

16 And I apologize for the wording of the verdict form,  
17 I see why you were confused, and that's my fault. So let me  
18 try and clarify. And I have written out the answer to the  
19 questions and it will go back with you. But let me just read  
20 it.

21 The Court has received your question. Question 3 can  
22 be answered affirmatively if you find by a preponderance of the  
23 evidence that the School Board had actual knowledge of an  
24 allegation or allegations that on March 8 of -- on the March 8,  
25 2017 bus trip Jack Smith sexually harassed Jane Doe.

1           If the School Board had actual knowledge of such an  
2       allegation or allegations, then it knew of the sexual  
3       harassment of Jane Doe on the March 8 bus trip for the purposes  
4       of question number 4.

5           So I hope that helps you. I will ask you now to  
6       return to that beautiful jury room and continue deliberating.

7           All right. Thank you so much. You're excused.

8           NOTE: At this point, 9:14 a.m., the jury leaves the  
9       courtroom; whereupon the case continues as follows:

10       JURY OUT

11           THE COURT: All right. We are going to let the group  
12       in for our Friday morning docket, and we will await further  
13       word from the jury. And we will interrupt the docket if we  
14       have to take care of the jury.

15           MR. ATES: Thank you, Your Honor. I've let the  
16       courtroom clerk know, we're going to be in the attorney work  
17       room on 4, Your Honor. So I am not going to be on a cell  
18       phone.

19           THE COURT: Okay.

20           MR. ATES: We are going to stay in the courthouse.

21           THE COURT: Okay, great.

22           MR. ATES: Thank you, Your Honor.

23           THE COURT: Thank you all.

24           MS. REWARI: Thank you.

25           MR. RAPHAEL: Thank you, Your Honor.

1 MS. CORREIA: Thank you, Your Honor.

2 NOTE: At this point a recess is taken; at the  
3 conclusion of which the case continues in the absence of the  
4 jury as follows:

5 JURY OUT

6 THE COURT: All right, let's call the Doe case back  
7 into court.

8 THE CLERK: Recalling civil action 1:18-cv-614, Jane  
9 Doe versus Fairfax County School Board.

10 THE COURT: All right, I understand we have a  
11 verdict. Are you ready to return the verdict?

12 MS. CORREIA: Yes, Your Honor.

13 MR. ATEs: Yes, we are, Your Honor.

14 MS. REWARI: Yes, Your Honor.

15 THE COURT: Okay. Joe, let's get our jury then.

16 NOTE: At this point, 11:14 a.m., the jury returns to  
17 the courtroom; whereupon the case continues as follows:

18 JURY IN

19 THE COURT: All right, please have a seat.

20 Do you have a verdict for us?

21 JURY FOREPERSON: Yes.

22 THE COURT: Would you hand it to Mr. Ruelas, please.

23 All right, thank you.

24 The foreperson has signed and dated the special  
25 interrogatory verdict form. They have answered yes to

1 questions 1 and 2. They have answered no to question number 3,  
2 that the School Board had actual knowledge of the alleged  
3 sexual harassment. And, therefore, not filled out the answers  
4 4 or 5.

5 Let's -- is that your unanimous verdict? All of you  
6 agree with it?

7 NOTE: The jurors responded affirmatively.

8 THE COURT: All right. Then thank you. Your  
9 deliberations are complete.

10 If you have an opportunity, I would like to say thank  
11 you to each of you. So if you have a minute to wait for me to  
12 come back, I have a few moments that I need to speak with  
13 counsel, and then I will get back there.

14 If you have to leave, I understand, but I would like  
15 to personally thank you for all of your time and effort here  
16 today.

17 All right. So you are excused at this time.

18 NOTE: At this point the jury is discharged and  
19 leaves the courtroom; whereupon the case continues as follows:

20 JURY DISCHARGED

21 THE COURT: All right. Any matters you want to  
22 address at this time? Plaintiff have any?

23 MR. ATES: Your Honor, we would have wanted them  
24 polled, but you asked the question of whether it was unanimous,  
25 so we--

1 THE COURT: Each of them nodded their heads yes.

2 MR. ATES: That's correct, Your Honor.

3 THE COURT: Okay. All right. I am going to go thank  
4 our jury. I thank all counsel.

5 Ms. Doe, you are a courageous young woman, and I am  
6 very proud of you. And I know your parents are very proud of  
7 you. And I wish you only the very best as you go through your  
8 college experience. And I hope that you put all this behind  
9 you through your help with counseling, and also your ability  
10 that I know you have to focus on the future and do great things  
11 with that future. And I trust that will happen.

12 And if there ever is a time that you ever want to  
13 talk with me, please, I am happy to talk with you any time.  
14 And please keep that in mind. All right?

15 MS. DOE: Thank you.

16 THE COURT: All right. Okay, we're in recess.

17 -----  
18 TRIAL CONCLUDED

19  
20  
21 I certify that the foregoing is a true and  
22 accurate transcription of my stenographic notes.

23  
24  
25 /s/ Norman B. Linnell  
Norman B. Linnell, RPR, CM, VCE, FCRR